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Via E-Filing

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, DC 20423

**Re: *Canexus Chemicals Canada, L.P. v. BNSF Railway Company*, STB Docket
No. NOR 42132**

Dear Ms. Brown:

Please find attached for filing Canexus Chemicals Canada, L.P.'s Reply to Motion to
Compel Discovery the above-captioned case.

Regards,

Thomas W. Wilcox

Attorney for Canexus Chemicals Canada, L.P.

cc: Counsel for BNSF Railway

CANEXUS CHEMICALS CANADA, L.P.

v.

Defendant.

REPLY TO MOTION TO COMPEL DISCOVERY

¹ Ex Parte 646 (Sub-No. 1), *Simplified Standards for Rail Rate Cases* (STB served Sept. 5, 2007); *aff'd*, *CSX Transp., Inc., et al. v. STB*, 568 F.3d 236 (D.C. Cir. 2009); *vacated in part*, 584 F.3d 1076 (D.C. Cir. 2009) (“*Simplified Standards*”).

related materials, as well as in common carrier pricing documents issued by other railroads that BNSF claims it cannot find and/or has not reviewed.

The reasons for denying BNSF's Motion are summarized as follows. First, BNSF is purportedly seeking information about other railroads' rates and service terms because BNSF apparently intends to argue, as an "other relevant factor,"² that the maximum reasonable rates for the issue movements from North Vancouver, British Columbia to Albuquerque, New Mexico and Glendale, Arizona produced by application of the Three-Benchmark methodology in this case should be adjusted upward due to BNSF having allegedly raised its other TIH rates in 2011 up to BNSF-perceived "market levels." Assuming that such an argument is even an appropriate "other relevant factors" argument, which Canexus does not concede, *none* of the rate and service term information BNSF seeks from Canexus was relied upon by BNSF's marketing personnel in developing its perceived market level determinations. BNSF's marketing personnel obviously had no access to the rates and terms in Canexus' confidential contracts with other railroads or Canexus' internal documents relating to those contracts. BNSF has also indicated that its marketing personnel did not review or rely upon public common carrier pricing information published by other rail carriers for movements of Canexus' chlorine.³ Indeed, BNSF's own filings demonstrate that BNSF's marketing

² Canexus has objected to producing data on the number of carloads annually shipped to each destination. Like rate and surcharge information, the number of carloads Canexus annually ships to each destination on other railroads is not information known by BNSF's marketing personnel, and so is also irrelevant for the purpose BNSF is seeking this discovery.

³ At page 7 of its Motion, BNSF complains about how it was unable to find common carrier pricing documents for TIH shipments on other carriers' websites, thus conceding that its marketing personnel did not rely on such information to formulate their view of the TIH transportation market. Such information is therefore also not discoverable from Canexus for the same reasons that its confidential contract information is not discoverable. Canexus has offered to produce any common carrier pricing documents in its possession that BNSF can demonstrate it relied upon but is unable to locate in its files. Moreover, BNSF's complaints about its fellow railroads' practices of not publicly disclosing their common carrier rates to transport TIH commodities is indicative of the issues

personnel relied on other information and analysis to ascertain what the "market" for TIH shipment was in 2011.

Second, BNSF is seeking information about the rates and terms established by other railroads to compare them, after-the-fact, to BNSF's rates for the issue movements. This is directly contrary to the letter and spirit of the Three-Benchmark rules, which specifically prohibit both defendant and complainant from comparing the defendant's rates to rate and traffic data from non-defendant railroads.

Third, BNSF's requests for rate and other commercial information between Canexus and other railroads violate the strict discovery standards the Board has adopted in Three-Benchmark cases. These standards are very cognizant about limiting the burden imposed on parties to these cases, the need to have the discovery process narrowly tailored, and excluding discovery of categories of evidence that, even if relevant, would unduly complicate the Three-Benchmark process. Contrary to BNSF's representations, the requests Canexus has objected to are not "narrowly drawn," and they impose burdens on Canexus that will unduly complicate and delay this and future Three-Benchmark cases, and raise the costs of litigating them.

I. THE APPLICABLE STANDARDS

Because of the expedited and simplified nature of a Three-Benchmark rate case, the Board has adopted strict standards for discovery that limit the number of discovery requests the parties can make as well as the scope of information that is discoverable. In particular, the Board imposes limits on the nature of the "other relevant factors" evidence it will consider and the breadth of discovery it

Canexus and other TIH shippers face when *they* are trying to evaluate the rates being offered them by railroads.

will permit. *Simplified Standards* at 22. The Board reserves the right to prohibit categories of evidence if experience demonstrates that the introduction of such evidence “would unduly complicate the process, which must be relatively simple and inexpensive to have any value.” *Id.* When the Board is reviewing discovery disputes by either party over evidence of other relevant factors, “we will scrutinize the burden placed on each party from which discovery is sought. Even if information requests are clearly relevant, if the burden is considerable we will not require discovery.” *Id.* Additionally, parties seeking “other relevant factors” evidence are “strongly encouraged to narrowly tailor” such requests, and “will have to show how the information requested is consistent with the expedited and simplified nature of this process.” *Id.* at 78. *See also* 49 USC §10704(d) (rate case procedures must include measures for avoiding delay in the discovery and evidentiary phases of proceedings).

II. THE DISPUTED REQUESTS AND CANEXUS' OBJECTIONS

The specific information that Canexus has objected to providing in response to the BNSF's four discovery requests covered by the Motion (Interrogatory Nos. 1 and 2, and Document Requests Nos. 4 and 8; Motion at 4-5), consists of (1) information from or relating to Canexus' confidential contracts with railroads other than BNSF; and (2) common carrier rate and service term information established by other railroads for Canexus movements, neither of which were used by BNSF to determine what it believes to be the “market” for TIH transportation rates. BNSF has asked Canexus to produce this information from 2006-2011. In addition to raising several general objections, Canexus has specifically objected to these requests on several grounds, including that they seek “information that is not relevant to any of the issues in this case or calculated to lead to the discovery of admissible evidence.”

Contrary to the inferences made in the Motion, Canexus has *not* refused to produce any information responsive to these requests. On the contrary, Canexus has agreed to produce, and has produced, the Origin/Destination pair data requested by Interrogatory No. 1. Canexus has also agreed to produce responsive information that it can locate through a reasonable search of its files that pertain to the relationship between BNSF and Canexus. Canexus is also not opposed to producing common carrier documents in its possession that BNSF can demonstrate its personnel viewed and relied upon in making rail market determinations but that are no longer accessible to them or readily available in their files.

III. ARGUMENT

A. The Information Sought is Not Relevant Because BNSF Has Already Made a Market Determination Using Other Information

The information BNSF seeks from Canexus in discovery about its transportation arrangements with other railroads is irrelevant because BNSF admits that it (1) previously made an assessment of the TIH transportation market without using *any* of the information it now seeks from Canexus, and (2) relied upon that assessment to increase rates to Canexus in 2011. In his Verified Statement submitted in this proceeding on December 14, 2011, Mr. David Garin, the BNSF Group Vice President, Marketing – Industrial Products, who is responsible for BNSF’s sales and marketing of rail transportation for TIH and PIH commodities, states that sometime prior to 2011, “it became apparent that we had been charging below market rates for the transportation of TIH materials, especially for long-haul movements.” Garin V.S. at 2 (emphasis added). Mr. Garin specifically cited a particular BNSF chlorine rate that “was so below market” that it resulted in chlorine shippers tendering traffic to BNSF for long distance movements even though the customers allegedly had

multiple other rail options that would have moved shorter distances. *Id.* at 3 (emphasis added). Mr. Garin further explained that his group “attempted to eliminate these requests for circuitous routing and to bring our below market rates into line with market rates.” *Id.* (emphasis added). According to Mr. Garin, his group decided to tackle this problem by “establishing generally higher rates for movements between specified freight stations.” Moreover, “[s]ince market indicators were that the longer-haul TIH movements had been priced farther below market than the short-haul movements, we adopted proportionally higher rate increases for long haul chlorine and other TIH movements than for short-haul movements.” *Id.* Finally, Mr. Garin asserted that his group had correctly analyzed the market for TIH rail transportation because “considerable TIH traffic has continued to move on BNSF after the March 2011 price increases.” *Id.* at 4.

It is clear from the foregoing that any alleged “market” justification for raising the issue rates was made prior to March, 2011 based on information available to BNSF at that time, none of which included any information in the possession of Canexus. BNSF (1) determined what the market for chlorine and other TIH transportation was; (2) concluded that BNSF was below this market; and (3) brought its rates in line with that market. Since *none* of the contract information BNSF now seeks from Canexus would have been available to Mr. Garin’s group, and BNSF has admitted that it did not rely on common carrier pricing information between Canexus and other railroads, *none* of the information BNSF seeks in discovery is relevant to what its determination of the market was when it set the challenged rates at their March 16, 2011 levels.

The only justification BNSF raises for supposedly needing confidential contract and common carrier rate, surcharge and carload information from Canexus’ arrangements with other railroads is that BNSF hopes this information will “shed light on the validity of BNSF’s claims” that its rates were “below market.” Motion at 6. BNSF bears the burden of overcoming the presumption that the

rate levels for the issue traffic produced by the Three-Benchmark analysis are the maximum reasonable rates for this transportation. *Simplified Standards* at 77. To the extent BNSF seeks to argue that its view of the market for chlorine transportation in 2011 is somehow an “other relevant factor” that requires an adjustment to the rates produced by the analysis, BNSF must try and meet its burden by presenting the evidence that its marketing personnel actually relied upon to make their market assessment. BNSF counsel should not be permitted to try and shore up such a claim using information that BNSF’s marketing personnel did not see or use, and, in the case of Canexus’ confidential contracts with other railroads, could not have had access to.⁴

B. The Information BNSF Seeks About Non-Defendant Railroads is not Admissible in a Three-Benchmark Case

In addition to being completely irrelevant to the purpose for which BNSF states it is seeking the information, the four discovery requests at issue ask for information that the Board elected to exclude from Three-Benchmark cases, and therefore seek information that would be inadmissible. Specifically, BNSF states that it needs confidential contract and other pricing information between Canexus and other railroads to hopefully validate BNSF’s claims that its increases of TIH rates were “more rational and consistent with the market.” Motion at 2. This is just another way of stating that BNSF wants to try and validate its rates by comparing them to the TIH rates of other railroads after-the-fact.

However, the Board in *Simplified Standards* explicitly reviewed the issue of including non-defendant railroad rates in the comparison process in Three-Benchmark cases and decided to exclude

⁴ Even if the confidential contract information BNSF seeks is ordered to be produced, it would be properly designated as Highly Confidential information, which means it still could never be reviewed and/or relied upon by BNSF’s marketing personnel to assess the market for TIH rail transportation.

them, primarily at the request of the railroad participants in that proceeding. *Simplified Standards* at 82. Among the reasons for excluding non-defendant rate data was “that the rates for traffic of another railroad should not be compared with the defendant railroad’s rates, as carriers operate different networks with different cost structures.” *Id.* The railroads also expressed confidentiality concerns. As for the Board, it noted that revenue-to-variable cost ratios vary from railroad to railroad, and that “the reasonable degree of differential pricing one carrier can exercise is also a function of the mix of traffic.” *Id.* The Board concluded that “the R/VC ratio of potentially captive traffic of one carrier provides no useful indicia of the lawful contribution of fixed and common costs for another carrier.” *Id.* at 83.

The foregoing discussion was in the context of whether to allow the inclusion of non-defendant rates in a traffic comparison group, but the issues raised and the Board’s overall conclusion apply with equal force to BNSF’s attempt to bring non-defendant railroad rates into the overall Three-Benchmark analysis as part of an apparent “other relevant factors” claim. This is particularly true since two of the other non-defendant railroads from which BNSF is seeking to discover rate and other information from Canexus are the Canadian National Railway and Canadian Pacific Railway, which operate for the most part under a different regulatory regime and overall railroad transportation market than BNSF.

C. The Requests Violate the Strict Discovery Standards in Three-Benchmark Cases

Finally, BNSF’s requests for confidential contract data and other pricing data between Canexus and other railroads are contrary to the strict discovery standards for Three-Benchmark cases summarized above. These standards are in place to permit some discovery in Three-Benchmark cases, but the Board made clear that these cases must remain “relatively simple and inexpensive to

have any value.” *Id* at 22. Canexus (and future complainants) should not be compelled to expend the time and increased litigation costs to produce information from its confidential contractual relationships with other railroads and other information BNSF could not have relied on to make market determinations, and which information is not admissible in the Three-Benchmark analysis in any event. This just adds irrelevant and unnecessary discovery obligations on complainants. BNSF’s assertions that the disputed discovery requests are “narrowly tailored” and are not unduly burdensome are incorrect.⁵ While BNSF has stated that its assessment of the market for TIH transportation occurred in 2011, BNSF’s requests seek contract and common carrier rate information between Canexus and other railroads going back to 2006. Canexus ships the chlorine produced by its North Vancouver facility to numerous destinations on multiple railroads each year. Since 2006 it has shipped chlorine to over 70 destinations in the United States and Canada. Moreover, the rate, fuel surcharge, and carload data for some movements sometimes change during a given year and in some cases more than once a year. It would be extraordinarily burdensome and time consuming for Canexus to try to locate and gather this information from its files for all of the years covered by BNSF’s requests. Moreover, the fact that production of confidential contracts requires prior notification to the contracting railroad party would necessarily mean additional delays in processing this case.⁶

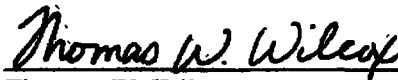
⁵ Contrary to the statements in BNSF’s motion about Canexus’ burden objections, the very first General Objection imposed by Canexus, which applies to all of BNSF’s discovery requests, is that “Canexus objects to the requests to the extent they are contrary to the strict discovery standards applied by the Board in Three-Benchmark method cases, in which greater emphasis is placed on the burden imposed. Moreover, Canexus objects to the requests to the extent they are not narrowly tailored to ‘other relevant factors,’ or otherwise inconsistent with the expedited and simplified nature of the Three-Benchmark process.”

⁶ BNSF’s Motion states that Canexus has submitted requests that sought “certain BNSF contracts.” Motion at 8. Canexus has sought discovery of one contract between BNSF and a short line railroad. It has also sought discovery of contracts between BNSF and other TIH shippers, but

**IV.
CONCLUSION**

For all the reasons set forth above, BNSF's Motion should be denied.

Respectfully submitted,



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Dated: January 23, 2012

such discovery is specifically permitted by the Board's "other relevant factor" adjustment for contacts rates established in Docket 42114, *U.S. Magnesium v. Union Pacific Railroad Company* (STB served January 28, 2010). BNSF has thus far resisted complying with these discovery requests.

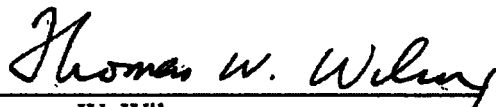
CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of January, 2012, I served a copy of the foregoing Reply to Motion to Compel Discovery via email and first-class mail to the following addressees:

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